FILE COPY

No. 103

In the Supreme Court of the United States

OCTOBER TERM, 1938

DISTRICT OF COLUMBIA, PETITIONER

v.

ETHEL CLAWANS

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION

May it Please the Court: The petition of the District of Columbia respectfully shows to this Honorable Court:

STATEMENT OF THE MATTER INVOLVED

On May 13, 1935, an information was filed in the Police Court charging that the respondent:

> On the 24th day of March in the year A. D. 1935, in the District of Columbia, and divers other days and times between that date and the date of the filing of this information, did * * * engage in the business of a dealer in second-hand personal property, to wit, did

> then and there engage in the business of selling the return or other unused portions of railroad tickets, the same evidencing the right of the purchaser, holder or possessor thereof, to be transported by railroad from one state or territory of the United States, or from the District of Columbia to any other state or territory of the United States, or to the District of Columbia, without first having obtained a license so to do.

The respondent pleaded "Not Guilty" and demanded a trial by jury, which demand was denied and an exception noted. Upon a trial by the Court she was convicted and sentenced to pay a fine of $300 or, in default thereof, to serve a term of sixty days in jail.

Upon petition of the respondent, specifying several alleged errors in the trial of the cause, including the refusal to grant to a jury trial, the United States Court of Appeals for the District of Columbia allowed a writ of error. In its decision the Court found the other assignments of error to be without substance, but reversed the judgment of conviction upon the ground that respondent was entitled to trial by jury (R. 28).

QUESTION PRESENTED

The sole question is whether one charged with a violation of an Act of Congress, in the nature of a municipal ordinance, which provides a maximum penalty of $300 or ninety days, is entitled to trial

by jury, notwithstanding the provisions of an Act of Congress prescribing summary trials in such cases.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The United States Court of Appeals for the District of Columbia in this case has decided a question of substance relating to the construction and application of the Constitution of the United States and a statute enacted by Congress, which has not been, but should be, settled by this Court.

2. The United States Court of Appeals has decided that an offense, which, if known to the common law, was within the class of offenses then regarded as "petty", must be tried by jury, notwithstanding the punishment prescribed is less than that imposed after summary trial of certain petty offenses at common law.

3. The question is of great importance to the District of Columbia in the enforcement of the License Law, and numerous regulations promulgated thereunder, and may be of even greater importance throughout the country if Congress seeks more expeditious enforcement of the laws relating to minor offenses. The records of the Metropolitan Police Department of the District of Columbia show that more than three hundred and eighty persons were charged with violations of the License Law in the District of Columbia in the fiscal year 1935, and that approximately four hundred per-

sons were charged with such offenses in the fiscal year 1934. In addition, there are many charges of violations of regulations promulgated under authority of the License Law, the records of which are not segregated from records of violations of general police regulations.. The License Law requires the licensing of more than seventy forms of businesses, trades, occupations, and professions. The requirement of trial by jury in such cases would seriously impede the effective administration of this and similar laws.

4. This Court should determine whether the offense of engaging in a business without a license, for which a maximum sentence of $300 or ninety days may be imposed, is to be classed as a "crime" and tried by jury as a "criminal prosecution."

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 6601, *Ethel Clawans, Plaintiff in Error,* v. *District of Columbia, Defendant in Error,* and that the said judgment of the United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your peti-

tioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

DISTRICT OF COLUMBIA,
By VERNON E. WEST,
Acting Corporation Counsel, D. C.
RAYMOND SPARKS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

No opinion was rendered by the Police Court. The opinion of the United States Court of Appeals (R. 23–28) is not reported.

II

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 11, 1936. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

III

STATEMENT OF THE CASE

A statement of the facts will be found in the petition.

IV

SPECIFICATION OF ERRORS

The United States Court of Appeals erred:

1. In holding that the respondent was entitled to a trial by jury.

2. In holding that the offense of engaging in the business of a second-hand dealer without a license, as defined and punished in the License Act of the District of Columbia, is a crime within the meaning of the Constitution of the United States.

3. In holding that the Act of Congress which specifies petty offenses triable without a jury is unconstitutional.

4. In holding that the absence of an absolute right of appeal is a factor to be considered in determining whether trial by jury is required.

V

PROVISIONS OF CONSTITUTION AND OF STATUTES INVOLVED

Article III, Section 2, Clause 3, of the Constitution provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury. * * *

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. * * *

Section 44 of the 1901 Code of the District of Columbia (31 Stat. 1189), as amended by the Act of Congress approved March 3, 1925 (43 Stat. 1119), provides, in pertinent part, as follows:

> That prosecutions in the police court shall be on information by the proper prosecuting

officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury * * *.

The decision of the lower court, in effect, renders this Act of Congress unconstitutional.

Section 7 of the Act approved July 1, 1902 (32 Stat. 622, c. 1352), as amended by the Act approved July 1, 1932 (47 Stat. 550, c. 356), provides, in part, as follows:

> PAR. 1. No person shall engage in or carry on any business, trade, profession, or calling in the District of Columbia for which a license fee or tax is imposed by the terms of this section without having first obtained a license so to do. * * *

PAR. 39. Dealers in secondhand personal property, including the return or other unused portion of any ticket, order, or token purporting to evidence the right of the holder or possessor thereof to be transported by any railroad or other common carrier, however operated, from one State or Territory of the United States, or from the District of Columbia, to any other State or Territory of the United States or to the District of Columbia shall pay a license tax of $50 per annum. Every person engaged in the business of buying, selling, trading, exchanging, or dealing in secondhand personal property of any description, including the return or unused portion of any such ticket, order, or token, shall be regarded as a secondhand dealer. * * *

PAR. 47. Prosecutions for violations of any of the provisions of this section, or of any paragraph added hereto from time to time by the Commissioners of the District of Columbia, or of any regulation made by the commissioners under authority of this section, shall be on information in the police court of the District of Columbia by the corporation counsel of the District of Columbia or any of his assistants.

PAR. 48. Any person violating any of the provisions of this section, or additions thereto made from time to time by the Commissioners of the District of Columbia, where no specific penalty is fixed, or the violation of any regulation made by the commissioners under the authority of this sec-

tion, shall upon conviction be fined not more than $300 or imprisoned for not more than ninety days.

VI

ARGUMENT

A. THE CONSTITUTION DOES NOT REQUIRE THE TRIAL OF PETTY OFFENSES BY JURY

In *Schick* v. *United States,* 195 U. S. 65, where the court sustained the waiver of a jury in a trial where the maximum punishment was a fine of fifty dollars, the court declared that the provisions of the Constitution for trial by jury did not extend to petty offenses, saying (pp. 68, 70):

> The truth is, the nature of the offense and the amount of punishment prescribed rather than its place in the statutes determine whether it is to be classed among serious or petty offenses. * * *
>
> When the change was made from "criminal offenses" to "crimes", and made in the light of the popular understanding of the meaning of the word "crimes", as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of a jury the trial of petty criminal offenses.

The test prescribed in the *Schick case, supra,* was qualified in *Colts* v. *District of Columbia,* 282 U. S. 63, 73, where the defendant was convicted in the Police Court of the District of Columbia of the offense of "Reckless Driving." This Court found

that the offense was *malum in se* and was indictable at common law, and said:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense.

In *Callan* v. *Wilson,* 127 U. S. 540, the Police Court of the District of Columbia had tried a defendant charged with conspiracy and had refused his demand for a jury. The sentence which was actually imposed in this case was a light one; but under the common law which was then in force in the District of Columbia (Rev. Stat. Dist. Col., sec. 92; *State* v. *Buchanan,* 5 Harris & Johnson (Md.) 317, 360) conspiracy was punishable by imprisonment for more than one year at the discretion of the court (Rev. Stat. Dist. Col., secs. 1144, 1049; *United States* v. *Marshall,* 17 D. C. 34; *Palmer* v. *Lenovitz,* 34 App. D. C. 303, 305). This Court found that the offense was a crime indictable at common law, and said (p. 555):

> Without further reference to the authorities, and conceding that *there is a class of petty or minor offenses, not usually embraced in public criminal statutes, and not of the class or grade triable at common law by a jury, and which, if committed in this District, may, under the authority of Congress, be tried by the court and without a jury,* we are of opinion that the offense with

> which the appellant is charged does not belong to that class. * * *. It is an offense of a grave character, affecting the public at large, * * * (p. 556). [Italics ours.]

In *Patton et al.* v. *United States,* 281 U. S. 276, 312, this Court said:

> Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases *above the grade of petty offenses.* [Italics ours.]

A violation of the License Law is a petty offense. The offense is not included in a criminal statute but was specifically provided for originally in an Appropriation Act for the District of Columbia. It deals simply with local conditions, is designed to provide revenue and to insure the regulation of certain occupations and businesses by local municipal authorities.

The United States Court of Appeals, in its decision in the case at bar, admitted the offense of doing business without a license was, if known to the common law, regarded as petty; that it contained no element of moral turpitude; and that there is nothing in the nature of the offense by which it may be characterized as a crime (R. 26). The Court, however, decided that a jury trial was required in prosecutions under the License Act upon the ground that the extent of the punishment provided thereby is so severe as to take the offense out of the category of "petty" and make

it a "crime", especially where, as here, no absolute right of appeal exists from the Police Court to the United States Court of Appeals (R. 27, 28). This decision invokes a novel construction of the Constitution and violates the cardinal rule laid down by this Court that the Third Article of the Constitution, relating to trial by jury,

> is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. (*Callan* v. *Wilson,* 127 U. S. 540, 549.)

This general principle was reaffirmed in *Ex Parte Grossman,* 267 U. S. 87, 108, where this Court said:

> The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted.

B. DECISIONS OF STATE COURTS SUPPORT THE POSITIONS THAT AN OFFENSE SUCH AS IS HERE INVOLVED MAY BE TRIED BY SUMMARY PROCEDURE

In *Bray* v. *State* (1903), 140 Ala. 172, a defendant was denied a jury in a prosecution for violation of an ordinance which punished failure to pay hack fare. He was convicted and sentenced to six months at hard labor. Trial without jury was sustained.

In *State* v. *Parker* (1924), 87 Fla. 181, an ordinance forbade any one to operate an automobile while intoxicated, under penalty of imprisonment

for not less than thirty nor more than sixty days for the first offense. The defendant was tried by the municipal court without the right to trial by jury. He was found guilty and sentenced to imprisonment for thirty days. Trial without jury was sustained.

In *State* v. *Glenn* (1880), 54 Md. 572, an habitually disorderly person was tried without a jury and sentenced to six months in the house of correction. The trial was sustained. See especially pages 599 to 606. In *Lancaster* v. *State* (1899), 90 Md. 211, a statute authorized police justices to try for assaults without jury. The statute was held valid. The sentence was eighteen months imprisonment. See also *State* v. *Loden,* 117 Md. 373.

In *State* v. *Broms* (1918), 139 Minn. 402, the defendant was prosecuted under an ordinance for disorderly conduct, was convicted and sentenced to hard labor for ninety days. The Court held that he was not entitled to a jury trial. In *State* v. *Anderson* (1925), 165 Minn. 150, the court decided that one who was accused of selling intoxicating liquor unlawfully in violation of an ordinance was not entitled to trial by jury. In that case the defendant was sentenced to imprisonment for ninety days.

In *Bell* v. *State* (1920), 104 Neb. 203, and *State* v. *Kacin* (1932), 241 N. W. 785, 123 Neb. 64, a State law forbade the possession and transportation of intoxicating liquors. Magistrates and po-

lice courts were empowered to try without jury all violations of that act and all violations of ordinances where the penalty did not exceed a fine of one hundred dollars or imprisonment for three months. The statute was sustained.

In *State* v. *Ruhe* (1898), 24 Nev. 251, in *quo warranto* proceedings the court sustained a statute which provided that trials for the infraction of ordinances of a police nature should be summary in character before the police judge without a jury. By statute the jurisdiction of the police judge included cases in which he might impose fine or imprisonment or both.

In *People* v. *Harding* (1921), 189 N. Y. Supp. 657, the court held that one who is accused of vagrancy is not entitled to trial by jury even though upon conviction he might be sentenced to three years in a correctional institution or to one year in a jail or penitentiary. *In Matter of Cooley* v. *Wilder,* 234 App. Div. 256, the court sustained a sentence of six months in jail where trial by jury was not allowed the defendant. See also *People* v. *Stein* (1903), 80 App. Div. 357.

In *Byers and Davis* v. *Commonwealth* (1862), 42 Pa. St. 89, an act authorized the mayor or police magistrate to try a professional thief or pickpocket who frequented designated places for an unlawful purpose and if he were found guilty to commit him to hard labor in the county jail for not more than ninety days. The defendants were tried without

a jury, were convicted, and were sentenced to hard labor in jail for ninety days. The act was sustained. See especially pages 94 to 96.

Petitioner has been unable to find any decision of the Federal Courts bearing specifically upon the point under consideration here.

C. CONGRESS HAS NOT CURTAILED THE RIGHT OF TRIAL BY JURY

By enactment of the Act of March 3, 1925 (43 Stat. 1119), Congress has prescribed trial by jury for offenses punishable by more than $300 or ninety days, thereby actually reducing the number of offenses, involving violations of statutes in the nature of municipal ordinances, which otherwise, under the Constitution, may be tried summarily. There is no question that such offenses involving sentences greater than 90 days were tried summarily at common law (R. 24, 25). (Harvard Law Review, June 1926, Vol. XXXIX; *State* v. *Glenn*, 54 Md. 572.) In the opinion of the lower Court it appears to be conceded that the offense here is within that class, both as to its nature and the punishment which may be imposed.[1] This Court has

[1] The offense with which we are here concerned is the breach of a municipal ordinance. It is an offense which, if known to the common law, was certainly regarded as petty—an offense to which there is not attached any of the elements of moral turpitude. There is, therefore, nothing in the "nature of the offense" by which it may be characterized as a crime. It is of that class of cases described by Mr. Dillon

said that the provisions of the Constitution prescribing trial by jury are to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. *Callan* v. *Wilson*, 127 U. S. 540, 549. If violations of laws in the nature of municipal ordinances were tried summarily at common law, offenses within the same class involving similar punishment may now be tried summarily. Obviously, therefore, Congress has not ignored the constitutional requirements, but, on the contrary, it has enlarged the class of cases triable by jury.

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in his work on Municipal Corporations (Vol. 1, Sec. 433), as falling within the description of municipal police regulations and which relate to acts and omissions not embraced in the general criminal legislation of the state. Such acts and omissions were regarded as innocent, or at least as trivial, one hundred and fifty years ago. Obviously, therefore, the doing of business without the payment of a license tax was not a crime within the contemplation of the makers of the Constitution or the people of the Colonies at the time of the adoption of the Constitution (R. 26).

* * * if the test is whether the punishment which may be imposed is of a kind and nature which could be imposed in summary proceedings at the time of the adoption of the Constitution, the conviction would likewise have to stand; for the most casual examination of the history of the English criminal law from the time of James I to the time of our Revolution—and, as well, the history of criminal procedure in most of the American Colonies—shows unmistakably that summary proceedings, involving even severer punishments than the maximum provided under the statute in question, were not then uncommon (R. 24).

D. THE ABSENCE OF AN ABSOLUTE RIGHT OF APPEAL DOES NOT AFFECT THE RIGHT OF TRIAL BY JURY

The United States Court of Appeals based its decision upon the extent of punishment which may be imposed, laying stress upon the fact that appeal from the Police Court is not a right but exists only by writ of error issuable in the discretion of the Appellate Court (R. 27). The Court concluded (R. 27, 28):

> For these reasons, we are of opinion that the constitutional provisions with relation to jury trial apply, first, in all cases—*especially in all cases where as here there is no election of right and no appeal of right*—in which the offense charged was an indictable offense under the common law, without regard to the measure of punishment; and, second, in all cases, without regard to the nature of the offense, where the punishment which may be inflicted under the statute involves a sentence as severe as confinement in jail for ninety days. [Italics supplied.]

This Court has repeatedly held that a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law (*McKane* v. *Durston,* 153 U. S. 684, 686; *Andrews* v. *Swartz,* 156 U. S. 276; *Murphy* v. *Massachusetts,* 177 U. S. 155). It is presumed that the appellate court will grant a writ of error in a proper case, thus insuring the defend-

ant a review in cases where error is brought to the attention of the appellate court.

In the case of *State* v. *Loden,* 117 Md. 373 (1912), the Court sustained a statute which empowered police magistrates to try without a jury violations of a license law where the maximum penalty of $50 or ninety days, or both, could be imposed, and where no right of appeal was provided. See especially pages 385 and 386.

VII

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that a proper construction of the Constitution and of the Acts of Congress involved may be had, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the District of Columbia and finally reverse it.

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